

**UNITED STATES COURT OF APPEALS FOR  
THE DISTRICT OF COLUMBIA CIRCUIT**

AMERICAN WHITEWATER )

)

Petitioner, )

No. 23-1291

V. )

FEDERAL ENERGY REGULATORY )

COMMISSION )

Respondent. )

)

**MOTION TO INTERVENE OF MAINE RIVERS AND CONSERVATION  
LAW FOUNDATION**

Pursuant to Federal Rules of Appellate Procedure 15 (d) and 27 and Circuit  
Rules 15(d) and 27, Maine Rivers and Conservation Law Foundation (“CLF”)<sup>1</sup>  
hereby respectfully move for leave to intervene in support of Petitioner American

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<sup>1</sup> Maine Rivers is a nonprofit corporation, formed in 2002, with a mission to protect, restore and enhance the ecological health of Maine’s river systems. Conservation Law Foundation (“CLF”), formed in 1966, is a non-profit advocacy organization with 5,000 members across New England, including approximately 500 in Maine, with a mission to protect and restore Maine and New England’s environment and promote vibrant communities.

Whitewater in the above captioned proceeding. This motion is timely because it is filed within 30 days of the filing of the petition for review by American Whitewater. Fed. R. App. P. 15(d).

## **BACKGROUND**

Aclara Meters, LLC, (“Aclara”) holds a license issued by the Federal Energy Regulatory Commission (“FERC”) for the Somersworth Hydroelectric Project on the Salmon Falls River between Maine and New Hampshire, FERC Project No. 3820 (“Project”). On March 29, 2019, Aclara filed an application to surrender the FERC license for the Project, proposing to leave two existing dams in place. Petitioner and various resource agencies and stakeholders objected, urging instead that, following the guidance of its governing statute, 16 U.S.C. 799, FERC should adopt a dam removal option due to the impact of the Project dams on diadromous fish and river connectivity. Disregarding these objections, FERC rejected dam removal as an option and instead approved Aclara’s surrender application and its plan to leave the existing dams in place. *Aclara Meters, LLC*, Order Approving Surrender of License, Project No. 3820-012, 183 FERC ¶ 62,095 (issued May 22, 2023) (“Surrender Order”).

American Whitewater requested rehearing of FERC’s order, arguing that FERC failed to evaluate whether removal would be in the public interest and that it

was arbitrary and capricious to reject dam removal as an alternative to leaving the dams in place as barriers to fish passage. American Whitewater also argued that FERC failed to comply with Section 401(a)(1) of the Clean Water Act, in deciding that the applicant was not required to obtain a water quality certificate from the Maine Department of Environmental Protection.

On June 20, 2023, American Whitewater sought timely rehearing of FERC's Surrender Order based on the following issues:

1. Did the Commission err in failing to determine that dam removal is in the public interest?
2. Did the Commission err by arbitrarily and capriciously rejecting the dam removal alternative?
3. Did the Commission err by failing to comply with Section 401(a)(1) of the Clean Water Act?

FERC did not substantively respond to American Whitewater's June 20 Request for Rehearing within 30 days, and on July 21, 2023, FERC issued a Notice of Denial of Rehearing by Operation of Law and Providing for Further Consideration. *Aclara Meters, LLC*, Notice of Denial of Rehearing by Operation of Law and Providing for Further Consideration, Project No. 3820-012, 184 FERC ¶ 62,047 (issued July 21, 2023) ("Rehearing Denial").

The Rehearing Denial also stated that FERC would address the arguments raised in the rehearing request in a future order. FERC did so on September 21,

2023, affirming its original Surrender Order that approved Aclara's surrender plan without requiring dam removal. *Aclara Meters, LLC*, Order Addressing Arguments Raised on Rehearing, Project No. 3820-012, 184 FERC ¶ 61,183 (Issued September 21, 2023 ("Rehearing Order")).

Subsequently, American Whitewater filed a Petition for Review with this Court on October 23, 2023. Maine Rivers and CLF seek leave to intervene to support the arguments advanced by American Whitewater in its Petition for Review.

### **STATEMENT OF INTEREST**

Maine Rivers and CLF seek to intervene in this case because each has a direct and substantial interest in the outcome of the appeal with regard to the three issues raised by American Whitewater. The resolution of those issues will have direct impact on the outcome of numerous pending matters relating to river restoration in the State of Maine where Maine Rivers and CLF are directly involved.

Specifically, Maine Rivers has recently initiated a pilot program to acquire disposal rights to remove barriers to fish passage posed by idle hydroelectric dams which will often require license surrender applications to FERC. These

applications will invariably involve statutory environmental analysis and, often, issues under Section 401 of the Clean Water Act.

These are also the same issues that are present in the advocacy of Maine Rivers and CLF in the FERC proceedings involving the surrender application submitted by the licensee of three dams on the Mousam River in Kennebunk, Maine. (FERC Project P-5362.) There, as here, the applicant proposes to surrender the facilities “standing in place” despite the fact that removal of the dams would open significant habitat for anadromous fish that populated the Mousam River prior to the construction of the dams several hundred years ago.

Maine Rivers and CLF are also engaged in the relicensing proceedings regarding the Shawmut Dam on the Kennebec River. (FERC Project P- 2322.) CLF, Maine Rivers, as well as other members of the Kennebec Coalition -- Atlantic Salmon Federation, Natural Resources Council of Maine and Trout Unlimited -- advocate for dam removal or effective fish passage at Shawmut and three other dams to ensure safe and effective passage of Atlantic salmon, an endangered species, in addition to providing safe passage for downstream migration of juvenile fish. These proceedings also involve environmental analysis and Clean Water Act issues.

Finally, Maine Rivers recently directed the Outlet Stream Alewife Restoration Initiative which involved removal of three dams and construction of three fishways that enable alewives to pass the sites of two removed dams, one on the Kennebec River and another on the Sebec River, and then up the Outlet Stream to spawn in China Lake. While small, the dams formerly blocked alewife migration to China Lake for nearly 200 years.

These activities are undertaken by Maine Rivers and CLF in fulfilling their missions of river restoration through advocating for elimination of barriers to fish passage, particularly when licenses for hydroelectric facilities are either being renewed or, as in this case, the owners are seeking to surrender their licenses. These conservation goals represent the interests of the many Maine citizens that are members of Maine Rivers and CLF, including those who live and recreate in the Salmon Falls watershed.

Granting this motion to intervene will not inconvenience the Court or any other party, as the Court has not yet ordered a briefing schedule and the motion is filed within thirty days of October 23, 2023, when the petition for review was filed. Fed. R. App. P. 15(d).

## CONCLUSION

Maine Rivers and CLF respectfully request that they be permitted to intervene in this case with full rights attendant thereto.

Dated this 14<sup>th</sup> day of November, 2023

/s/ Charles Owen Verrill, Jr

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**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME AND TYPE  
FACE LIMITS**

I hereby certify this document complies with the type-volume limitation of Fed. R. App. 27(d)(2)(a) and Circuit Rule 27(a) (2) and typestyle requirements of Fed. R. App. P. 32(a).

/s/ Sean Mahoney

Sean Mahoney, DC Cir Bar No 64602

Conservation Law Foundation

**CERTIFICATE OF SERVICE**

I hereby certify that on November 14, 2023, I electronically filed the foregoing Motion to Intervene of Maine Rivers with the Clerk of Court using the CM/ECF system which will send notification of such filing to all counsel of record.

/s/ Sean Mahoney

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